IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20521 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

DL ASHISH FOUNDATION TRUST - Petitioner(s)

Versus

SURAT URBAN DEVELOPMENT AUTHORITY & 1 - Respondent(s)

==========

Appearance :
Mr. Mihir Joshi, Senior Advocate with MR ANSHIN H DESAI for the Petitioner.
MR HS MUNSHAW for the Respondent no.1.
MR KB PUJARA for the Respondent no.2.

==========

CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 28/07/2006

CAV JUDGMENT

Rule. Learned Counsel Mr.H.S.Munshaw waives service of notice of Rule on behalf of respondent No.1.

Learned counsel Mr.K.B. Pujara waives service of notice of Rule on behalf of respondent No.2.

2. This petition has been preferred under Articles 226 of the Constitution of India against the decision taken by respondent No.1 i.e. Surat Urban Land Development Authority (hereinafter referred to as “SUDA”) to grant the land bearing Final Plot No.176 admeasuring 8032 sq.mtrs., situated at Village : Vesu, Taluka: Choryasi, District: Surat to respondent No.2.

3. The facts leading to the present case are as under :-

An advertisement/Notice was issued in the local daily newspaper “Gujarat Mitra” by respondent No.1 stating therein that some land from Town Planning Scheme was to be given on lease for 99 years for educational activities and interested trusts, institutions, companies can apply by way of application by pre-qualification in a tender form. This advertisement was published on 19th October,2004. In pursuance of this advertisement, the present petitioner as well as respondent No.2 and others applied for land in question. The prices offered by different parties are as under :-

Sr. No.	Plot No.	Name of the Institute	Price per sq.mtr. offered in the price bid, by institution.
1	176	President, Pandesara Kelavani Mandal, Pandesara	Rs.5,200/-
2	"	Chairman, Pandesara Industrial Co.Op. Society Ltd., Surat	Rs.5,100/-
3	"	President, Mukbadhir Vikas Trust, Surat	At token rent of Rs.1/-
4	"	President, Jivan Bharati Mandal, Surat	Rs.7,500/-
5	"	Secretary, Sarvajanik Education Society, Surat	No amount found
6	"	S.D.Jain Modern School, Surat	Rs.5,100/-
7	"	D.L.A Academy For Little People, Surat	Rs.7,200/-

Thus, price offered by the present petitioner (Sr.No.7) was Rs.7,200/- per sq.mtrs. and the price offered by respondent No.2 (Sr.No.4) was Rs.7,500/- per sq.mtrs. No date or time for opening of the price bids was ever fixed by respondent No.1. The petitioner inquired, time and again, and on 30th September,2005, a letter was written (Annexure "H" to the memo of the petition) to the effect that the plot in question may be allotted to the petitioner, who is situated at adjacent land in question. They were in need of land for play ground for their students and it was also highlighted that they had shown their willingness to negotiate and quote highest price and, ultimately, Final Plot No.176

was given to the respondent No.2. Nobody was called for negotiations and, therefore, this petition has been preferred.

4. Learned Counsel Mr.Mihir Joshi appearing for the petitioner mainly submitted :-

(i) that the bids were not opened in the presence of the petitioner;

(ii) that the petitioner was not given the date and time of opening of price bids. In fact, fixed time and date for opening the price bids ought to have been given and they ought to have been opened in the presence of all the offerers;

(iii) that respondent No.1 is SUDA, is a “State” within the meaning of Article 12 of the Constitution of India. The difference in a price filled up in the price bids by the petitioner and respondent No.2 is only Rs.300/- per sq.mtrs. If the petitioner would have been called for negotiations, as stated in his letter dated 30th September,2005 (Annexure”H” to the memo of the petition) the petitioner was ready to offer higher price than what was offered by respondent No.2. Looking to the

aforesaid table, comparing to the price offered by different offerers, the petitioner's offer was not a negligible sum. In fact, the petitioner is ready to pay Rs.8500/- per sq.mtrs. for the land in question, which is Rs.1000/- more than the price offered by respondent No.2. Land in question is admeasuring about 8032 sq.metres and, therefore, approximately Rs.80 Lacs more could have been fetched by the SUDA, had the petitioner been called for negotiations especially looking to the closeness of the two figures of Rs.7,200/- and Rs.7,500/- offered by the petitioner and respondent No.2 respectively;

(iv) that the respondent no.1 is lacking bonafides in grant of land to respondent No.2 and in breach of principal of natural justice, the respondent No.1 has accepted the bid of respondent No.2;

(v) the grant of land to respondent no.2 shows malafide intention on the part of the respondent No.1 because the petitioner was never told when the price bids were to be opened. The whole procedure adopted by respondent No.1 of the opening of the price bids and grant of land to respondent No.2, in view of the aforesaid facts is not carried out in a transparent manner, otherwise at least date and time of opening of

price bids would have been intimated to the offerers and they would have been allowed to remain present;

(vi) the land disposal policy, which has been drafted in exercise of powers conferred under section 119 of the Gujarat Town Planning and Urban Development Act,1976 is not prohibiting or debarring 'the negotiations' for the purpose of fetching highest price. On the contrary, an endeavour must be to get the highest price especially when the land is to be disposed of by an institution, covered under Article 12 of the Constitution of India. The petitioner has approached this Court on 7th October,2005, immediately upon allotment of land in question to respondent No.2, which is dated 1st October,2005 and this Court vide order dated 10th October,2005, has passed an order to the effect that “Parties are directed to maintain status-quo as on today.” Thus, there is no delay on the part of the petitioner in approaching this Court.

(vii) That the petitioner is a bonafide offerer. Adjacent is the impugned land, where the petitioner is having a School, whereas respondent No.2 is situated 10 to 12 kms. away from the land in question. On the contrary, it is the petitioner, who wrote letters to

various authorities so that the sale of the land in question may take place as the petitioner was in dire need of the adjacent land and, therefore, at the behest of the petitioner, the ultimate decision has been taken for sale of the land in question.

(viii) There will not be any procedural lapse, if “the negotiations” between the parties are allowed. “sealed bidding procedure” is never prohibiting the negotiations between the parties and, therefore, the instruction issued by Chief Vigilance Commissioner in his circular dated 18th November,1998 are not coming in the way of the present petitioner, in view of the decision rendered by Division Bench of this Court in Special Civil Application No.3607 of 2006 (para 10,11, 12, 13 and 14)

(ix) Learned counsel for the petitioner has also relied upon the decision rendered by Hon'ble Supreme Court in the case of the case of **M/s.Produce Exchange Corpn.Ltd. V/s. The Commissioner of Excise, Assam and Others** reported in **(1972)3 SCC 713**.

(x) that plots which are to be used for commercial purpose, the respondent No.1 is calling for negotiations all the offerers, but, in respect of sale of plots for

educational purposes, only sealed cover tenders are invited. In fact, by an amendment in the present petition, it has been brought on record that similarly situated another plot, sold for education purpose to another trust by respondent No.1 by a public auction. Thus, all the offerers were permitted to increase their prices for that land. Present sale is also for educational purpose. Inter-se competition ought to be allowed by respondent No.1 for offering still higher price, than, what is referred, in the price bids. If this procedure for negotiations is to be followed, it is not detrimental to the interest of respondent No.1 nor it can cause any more delay in the sale of the land. On the contrary, no rules or regulations, circular, guide-lines or rule of thumb, are prohibiting negotiations whereby, there is only one out come, of fetching more price by respondent No.1. As the petitioner has not been called for negotiations and without informing date and time of opening of the price bids, the decision taken by respondent No.1, to allot the land in question, to respondent No.2 deserves to be quashed and set aside.

5. Learned counsel Mr.K.B.Pujara appearing for respondent No.2 mainly submitted that:-

(i) the advertisement for the sale of the land in question was given on 20th October,2004. Thereafter, as per the conditions of allotment of the land (which are referred at page no.53 of the memo of petition), there was allotment of the land to respondent No.2;

(ii) Thereafter on 5th October,2005, the respondent No.2 was informed by respondent No.1 that their offer has been accepted and respondent No.2 is directed to pay the amount of premium of Rs.6,02,40,000/-. Thus, the land has also been allotted to respondent No.2 as the respondent No.2 is the highest price bidder @ Rs.7,500/- per sq.metres.;

(iii) Negotiations have not been referred in the terms and conditions of the tender and, therefore, there is no scope for holding negotiation as per clause 9 of the land disposal policy. Clause 9 of the land disposal policy reads as under :

> **“9. Disposal sites/Land for Educational Facilities**
>
> Sites earmarked for educational facilities may be alloted to the Charitable/Religious Trust, Institutions, Public Institutions, Companies by inviting tenders through prominent daily newspapers. The tender shall be in two parts- one for pre-

> qualifications which shall be applied in prescribed “Form-G” and second be for price bid.
>
> The received tenders for pre-qualification shall be scrutinised. The Authority shall select the list of organisations which are being pre-qualified. Thereafter Authority shall invite the price bid in a sealed cover from the pre-qualified organisations and the highest price bid shall be considered for allotment.
>
> The premium price fixed shall not be less than the 50% of the market or reserved price whichever is more for inviting tenders.”
>
> (Emphasis supplied)

(iv) He has drawn attention of this Court on Rojkam drawn by respondent No.1, which is at Annexure “D” of the Affidavit-in Reply filed on behalf of respondent No.1 and has pointed out that the price bids were opened in the presence of Town Planning Officer, Chief Executive Officer and Chairman of Surat Urban Development Authority and, therefore, lack of transparency is out of question. The detailed resolution has also been passed by SUDA, which is a Annexure “E” to the Affidavit-in Reply filed by respondent No.1. Thus, the clause of negotiation, is not incorporated in the land disposal policy or in the terms and conditions given in the advertisement. Learned counsel for the respondent No.2 has relied upon the cases reported, as under :

(a) (2005)3 SCC 157

(b) (2005)4 SCC 435
(c) (2005)4 SCC 456
(d) (2005)7 SCC 484

(v) that the terms of advertisement were not challenged; regulations of auction were not challenged and once the tender is accepted, this Court may not interfere with the decision taken by the respondent No.1.

6. Learned counsel Mr.Munshaw for the respondent No.1 submitted that :-

(i) there is no breach of any of the policy, much less of land disposal policy by respondent No.1 in grant of land to respondent No.1;

(ii) there is no malafide intention on the part of the respondent No.1;

(iii) Land disposal policy does not provide for negotiations and opening of bids in presence of the concerned parties. Different are the criteria for the different type of the lands. Whenever the land is is to be disposed of for educational purpose, then tenders /bids are invited and no auction is held. Auction has not to be held for the disposal of the plots for educational

purpose.

(iv) Leaned counsel for the respondent No.1 has also relied upon the decision of the Government of Gujarat dated 17th September,2002 and has pointed out that there is no procedure for negotiations, with the applicants, to fetch still higher price, than what is referred, in writing, in their respective price bids.

7. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, in my opinion, the decision taken by respondent no.1 for allotment of land in question to respondent No.2 deserves to be quashed and set aside, mainly for the following facts and reasons:

(i) The respondent No.1 invited offers by giving public advertisement on 19th October,2004, which is at Annexure “R-1” to the Affidavit-in Reply filed by respondent No.2. In pursuance of this advertisement in a local daily, seven parties applied for the land in question as stated hereinabove. In the facts of the present case, the petitioner offered price for the land in question at the rate of Rs.7,200/- per sq.mtr. and respondent No.2 offered price for the land in question at

the rate of Rs.7,500/- per sq.mtr.. This land was to be sold for educational purpose i.e. for the purpose of School and for the purpose of playground. Looking to the resolution passed by the board, which is at Annexure “E” to the Affidavit-in Reply filed by respondent No.1 (in page no.88), neither the petitioner nor any other applicants were called for negotiations. There are no rules, regulations or policies, which prohibit negotiations with the applicants. If there is any prohibition or bar, then on the basis of the price referred in the price bids, the land can be allotted to the person/institution offering more price but looking to the rules and regulations referred in the land disposal policy drafted by the State under section 119 of the Town Planning and Urban Development Act,1976, there are no prohibitions or bar for negotiations with the petitioner. When the institution, which is a “State” within meaning of Article 12 of the Constitution of India is disposing of the land, then always attempts should be made so that highest price can be fetch for the land in question by negotiations. The petitioners are offering still highest price. This opportunity must be availed by the institution, which is a “State” especially when land is to be disposed of by inviting tenders (which is indicative of desire to fetch maximum price) and the

negotiations are not forbidden, debarred or prohibited by any policy, rules and regulations.

(ii) Much reliance has been placed upon land disposal policy by respondent Nos.1 and 2. Looking to clause 9 of the land disposal policy, there is no prohibition upon negotiations. On the contrary, the negotiations are fetching still higher price. This aspect of the matter ought to have been appreciated by respondent No.1. It is also contended by respondent No.1 that as per the direction of the Central Vigilance Commissioner, negotiations are not permissible as per circular dated 18th November,1998. The said circular reads as under:

> *"Tenders are generally a major source of corruption. In order to avoid corruption, a more transparent and effective system must be introduced. As post tender negotiations are the main source of corruption, post tender negotiations are banned with immediate effect except in the case of negotiations with L.T. (i.e. Lowest tenderer)."*

Looking to the order passed by Hon'ble Division Bench of this Court in Special Civil Application No.3607 of 2006, the negotiations are permissible despite the circulars issued by Central Vigilance Commissioner. Paras-10 and 14 of the said judgment read as under:-

> *"10. Since the instructions of the CVC are capable of being understood and read as done by the Corporation, it is high time the CVC reconsiders the matter by issuing revised instructions after taking into consideration the observations made in this judgment.*
>
> *14. However, merely because the tender notice invited the parties to submit sealed tenders does not necessarily mean that the Corporation was not going to call the parties for inter-se bidding or that only the highest tenderer was going to be given a opportunity to revise its bid. The terms of the tender have to be considered in the context of the current practices in the trade and business. In such matters, we have noticed that even where sealed tenders are invited in a large number of cases, all the eligible parties are called upon by the authority to participate in the inter-se bidding. Hence it cannot be said that the words "sealed tenders are invited" by themselves would mean that the Corporation was not going to invite the parties for inter-se bidding. In a large number of cases before this Court, the Court has permitted or even directed inter-se bidding or rebidding and the offers received at such inter-se biddings have been doubled."*
>
> *(Emphasis supplied)*

(iii) Looking to the difference of Rs. 300/- per sq.mtr. between the price offered by the petitioner and respondent No.2, it cannot be labelled as a very big difference. As a respondent No.1 is a State, there always must be an endeavor to get a highest price as a process of the disposal of the land. Unless there is an inbuilt condition and unless it is expressly prohibited, to hold

negotiations with, the applicants/bidders, the negotiations with the applicants are must. Whenever any institution or authority within the meaning of Article 12 of the Constitution of India is disposing of their properties including immovable property, unless there is an express prohibition upon negotiations with the applicants the negotiations with applicants shall be read as condition. In the facts of the present case, the land in question has been disposed of as per clause 9 of the land disposal policy drafted under section 119 of the Act,1976 and as there is no express bar for holding negotiations with the applicants/bidders, it is always a duty of the institution or authority, which is a “State” within the meaning of Article 12 of the Constitution of India to hold negotiations with offerers for purchase of properties of the “State”. The contention raised by the respondent no.1 that there is no procedure for negotiation with the petitioner is not accepted by this Court. If this argument is accepted then perhaps the authority, which is a “State” may not get the highest price. Whenever any institution, which is a “State” is disposing of land by inviting tenders, it shall be their duty to call the parties for further negotiations. Inter-se competition between the petitioner to offer still highest prices, than what is referred in the price bid,

is always helpful to the State for getting highest price. If the State is doing charity then this question does not arise, but, when the State is inviting tenders, for disposal of land, it has disclosed its mind that the State wants to get the highest price and, therefore, 'holding of negotiations' with the applicants, shall always be read as a procedure for fetching the highest price. Rule 9 of the land disposal policy is not prohibiting, debarring or ousting respondent No.1 from holding negotiations with the offerers. Total indifferent approach in disposing the land, has been adopted by respondent No.1. When two offerers are giving neck-by-neck close price, the respondent No.1 ought to have called at least these two offerers, or nearby offerers of the highest price, so as to check the possibility whether, they can increase their price and the State will be benefited by inter-se, competition amongst the offerers. If the price which is given in the price bid is accepted, then State may not get the highest price. Negotiations with the petitioner or with the offerers are not detrimental to the interest of the institution, which is a “State” nor this process of negotiation is taking much time. It hardly takes few hours. If these few hours would have been invested by the Officers of the “State” in holding negotiations with the

applicants at the time of opening of their price bids, and as stated hereinabove, additional amount of Rs.80 Lacs could have been obtained as price of land. It happens only in “State” that though petitioner showed his willingness to offer more price, in writing, the “State” is opposing this offer. This approach tantamounts to, indifferent approach of respondent No.1.

(iv) Looking to the letter dated 13th September,2005 at Annexure “H” to the memo of the petition, the petitioner had already conveyed to the respondent No.1 that they are not informed as to the opening of the price bid. Date and time of opening of price bids was not conveyed to the petitioner. The petitioner had shown its willingness to offer still highest price and their readiness to negotiate has been pointed out in writing vide letter dated 30th September,2005. Without paying any attention to this letter, respondent No.1 allotted the land in question to respondent No.1 vide letter dated 5th September,2005 (Annexure “R-6” to the Affidavit-in Reply filed by the respondent No.2- page no.62 of the present compilation.). Thus, from the very beginning, the petitioner was in search of negotiations and was ready to increase their offers as the land in question is situated in the adjacent plots and as they are in the need of the

land in question for their educational activities, whereas respondent No.2 is situated at a distance of approximately 10 to 12 kms.

(v) Whenever the land is to be disposed of by the Institution, which is “State”, it ought to maintain the transparency. The price bids ought to have been opened in the presence of the offerers and negotiations ought to have been allowed. The bid proceedings do not prohibit inter-se competition. No time and place was given to the petitioner for opening of the price bids. Lack of bonafide has been alleged. It is also pointed out through amendment in para-22(a) of the petition that the respondent No.1 has sold, similarly situated another plot to S.D.Jain School by a public auction, meaning thereby that inter-se competition amongst the offerers was allowed by respondent no.1 for a plot of land, which is given to S.D.Jain School.

(vi) It has been held by the Division Bench of this Court in Special Civil Application No.3607 of 2006 that the instructions given by Central Vigilance Commission (CVC) for not to hold negotiations should be understood and read, in view of the judgment delivered by this Court. It is observed in para-10 that “it is high time

the CVC should reconsider the matter by issuing revised instructions". Similarly, in para-14, whenever "sealed tenders are invited" inter-se bidding has also been made permissible. Sealed cover proceedings cannot oust the negotiations with the applicants. The words used in Clause 9 of the land disposal policy, especially "the received tenders for prequalification shall be scrutinised. The Authority shall select the list of organisations which are being prequalified. Thereafter Authority shall invite the price bid in sealed covers from the prequalified organisations and the highest price bid shall be considered for allotment. "The premium price fixed shall not be less than the 50% of the market or reserved price whichever is more for inviting tenders", does not means that always highest price bidder shall be given the land. On the contrary, it means that the highest price bidder can be considered for the allotment of the land, if ultimately in negotiations, he still remains the highest. Nowhere in the clause 9 of the land disposal policy, it is stated that the highest price bidder shall be given the land. On the contrary, it conveys the meaning that the highest price bidder shall fall in the zone of consideration for the allotment of land. Negotiations with applicants ought to be faced by the highest price bidder and still if he remains as

highest price offerers, the institution, which is a “State”, should allot the land to such final highest price bidder. Thus, clause 9 of the land disposal policy always permits inter-se price bidding. This interpretation of land disposal policy drafted by Government of Gujarat is not detrimental to the institution, which is “State” within the meaning of Article 12 of the Constitution of India, nor any prejudice is going to be caused to “State” when land is to be disposed of by inviting tenders (which reveals, the intention to secure highest price).

(vii) The present petition has been filed under Articles 226 of the Constitution of India without any loss of time. As per Annexure “R-6” to the Affidavit-in Reply filed by respondent No.2, a letter dated 5th October,2005 was received by respondent No.2, whereby respondent No.2 was informed by respondent No.1 to pay the premium at Rs.6,02,40,000/-. This petition has been preferred immediately on 7th October,2005 and, therefore, this Court vide order dated 10th October,2005 issued a Notice and ordered to maintain status quo. In view of this fact, petitioner has moved this Court very promptly. Looking to the status quo order, the clock has not moved forward even by a second. It is contended that the

petitioner is ready to offer Rs.8500/- per sq.metres., which is a baseline price for which the negotiation still fetch Rs.80 Lacs more to SUDA – the respondent No.1. The petitioner institute is also situated in adjacent plot i.e. nearby plot and is running educational institute.

(viii) The contention raised by the respondents that in view of the judgement cited by the respondents, this Court cannot alter the terms of the tender nor conditions of sale. This contention is not accepted by this Court mainly for the reason that here there is no question of condoning any lapse on the part of the petitioner or altering terms of tender or conditions of sale. All the requirements of tender have been fulfilled, like filling up of all necessary forms, tendering necessary documents, depositing earnest money, etc. This Court is not condoning any procedural lapse of any of the applicants, but here is a question whether negotiations between the parties/ inter-se bidding are to be read into Rule 9 of the land disposal policy? For the reasons stated hereinabove, unless it is expressly prohibited even if the price bid is invited in the sealed cover, whenever any institution, which is “State” within the meaning of Article 12 of the Constitution of India, it must hold negotiation with applicants, which are offering much

nearby price to the highest price bidder. There is no express bar or prohibition upon negotiations. This interpretation causes no prejudice to the interest of the respondent No.1 institution, when the land is offered to public at large and tenders are invited. (In contradiction with charity done by the “State”). If the land is offered in charity, there is no need for holding auction or inviting tenders but once the tenders are invited, the intention of the “State” is to fetch the highest maximum price and the process of fetching highest price, includes the negotiation with applicants. In the process of fetching highest price, “negotiations with applicants” are so interwoven that it cannot be segregated except with the help of expressed bar upon negotiations.

8. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements in the decision referred hereinabove and the judgment delivered by the Division Bench of this Court, the allotment of the land in question by respondent No.1 to respondent No.2 is hereby quashed and set aside. Looking to the facts of the present case, respondent No.1 is hereby directed to hold negotiations between the petitioner and respondent No.2 and whoever from them, is offering the highest price, the

land in question shall be allotted to it. Respondent No.1 is directed to hold negotiations between petitioner and respondent No.2 and complete the process of allotment of land as early as possible and practicable. Rule made absolute accordingly with no order as to costs.

(D.N.PATEL,J)

After pronouncement of this judgement, Learned counsel appearing for the respondent No.2 prayed for stay of this order, which is opposed by the learned counsel for the petitioner. Looking to the facts and circumstances of the case and the reasons stated hereinabove, I see no reason to stay the implementation, operation and execution of the aforesaid order passed by this Court.

(D.N.PATEL,J)

*dipti